Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

JESUS GARCIA-ZAVALA,

Petitioner,

v.

JOHN ASHCROFT,
UNITED STATES ATTORNEY GENERAL, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the court of appeals below erred in concluding that the petitioner's 1996 offense constituted an aggravated felony under § 101(a)(43) of the Immigration and Nationality Act – thereby divesting it of jurisdiction over the petition for review – because the petitioner's Michigan conviction was improperly obtained and violated his due process rights as a result of inconsistencies in the charging documents.

2. Whether the court of appeals below erred in its failure to exercise jurisdiction over the petitioner's substantial constitutional claims notwithstanding the jurisdiction-stripping effect of INA § 242(a)(2)(C), 8 U.S.C. § 1252(a)(2)(C).

3. Whether the jurisdiction-stripping effect of INA § 242(a)(2)(C), 8 U.S.C. § 1252(a)(2)(C), is unconstitutional because Congress cannot, regardless of whether the petitioner is an aggravated felon, divest the courts of jurisdiction to review substantial constitutional challenges when they involve an alien's fundamental rights.

4. Whether relief under former INA § 212(c), 8 U.S.C. § 1182(c), should be equally available to those who were otherwise eligible at the time they entered into plea agreements – as per this Court's decision in *St. Cyr* – as well as those who were likewise eligible, but instead elected to proceed with the jury trial in their underlying case.

PARTIES TO THE PROCEEDING

In addition to the Attorney General of the United States, the Board of Immigration Appeals and the Secretary of the Department of Homeland Security of the United States were also named as respondents in the underlying petition for review before the United States Court of Appeals for the Fifth Circuit.

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Jesus Garcia-Zavala, respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The memorandum of the court of appeals (App., *infra*, 1a-2a) granting respondent's motion to dismiss the petition for review for lack of jurisdiction is unreported. The Board of Immigration Appeals' decision of January 8, 2004 is also believed to be unreported (App., *infra*, 3a-6a).

JURISDICTION

The court of appeals granted respondent's motion to dismiss the petition for review for lack of jurisdiction on February 16, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article III, § 2 of the United States Constitution requires that federal courts decide only "cases" and "controversies," providing in pertinent part:

> *"The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . .*

to Controversies to which the United States shall be a Party. . . ."

U.S. Const. art. III, § 2.

2. The Fifth Amendment to the United States Constitution provides:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

U.S. Const., amend. V.

3. The Fourteenth Amendment to the United States Constitution states:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

U.S. Const., amend. XIV.

4. Prior to 1996, a noncitizen could apply for a discretionary waiver of inadmissibility or deportability under former § 212(c) of the Immigration and Nationality Act (hereinafter "INA" or "Act") which provided:

> *"Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General. . . ."*

INA § 212(c), 8 U.S.C. § 1182(c) (repealed) Section 212(c) was later amended by the Immigration Act of 1990 ("IMMACT") to preclude relief to any alien who has "been convicted of an aggravated felony and has served a term of imprisonment of at least 5 years." Section 511(a) of the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 5052.

5. Effective April 24, 1996, § 440(d) of the Antiterrorism and Effective Death Penalty Act (hereinafter "AEDPA") further narrowed the class of aliens for which § 212(c) relief was available:

> *"(d) Classes of Excludable Aliens. – Section 212(c) of such Act (8 U.S.C. 1182(c)) is amended –*
>
> *(1) by striking "The first sentence of this" and inserting "This"; and*
>
> *(2) by striking "has been convicted of one or more aggravated felonies" and all that follows through the end and inserting "is deportable by reason of having committed any criminal offense covered in section 241(a)(2) (A)(iii)* [aggravated felonies], *(B)* [controlled substances], *(C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are covered by section 241(a)(2)(A)(i)."""

Section 440(d) of Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214.

6. Effective April 1, 1997, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (hereinafter "IIRIRA") created new standards and procedures governing judicial review of final orders of removal, codified at INA § 242, 8 U.S.C. § 1252. *See* Section 309(a) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 [Title III-A general effective date]. At issue in the instant case is INA § 242(a)(2)(C), 8 U.S.C. § 1252(a)(2)(C) which states in pertinent part:

> *"Notwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 212(a)(2) or 237(a)(2)(A)(iii)* [8 U.S.C. § 1227(a)(2)(A)(iii), aggravated felony], *(B), (C), or (D), or any offense covered by section 237(a)(2)(A)(ii) for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 237(a)(2)(A)(i)."*

INA § 242(a)(2)(C), 8 U.S.C. § 1252(a)(2)(C).

In addition, IIRIRA also repealed 212(c) relief at § 304(b). IIRIRA § 304(b).

7. The term "aggravated felony" is defined in the Act as:

> *"illicit trafficking in controlled substance (as described in section 102 of the Controlled Substances Act), including a drug trafficking crime (as defined in section 924(c) of title 18, United States Code);"*

INA § 101(a)(43)(B), 8 U.S.C. § 1101(a)(43)(B).

STATEMENT OF THE CASE

1. The petitioner, Jesus Garcia-Zavala, became a lawful permanent resident of the United States in 1988.

2. On or about July 19, 1994, petitioner was charged for possession of marijuana with the intent to deliver, in violation of Michigan state law.

3. On September 20, 1996, the petitioner was convicted by a jury under Michigan Compiled Laws § 333.7401(2)(c), and sentenced to two years of probation. In addition, the judge in that case also granted petitioner permission to travel to Mexico in order to visit his grandmother.

4. On October 8, 1998, the petitioner's probation officer petitioned the Michigan judge to release the petitioner from probation, and an order was accordingly entered on November 4, 1998.

5. Upon his return from Mexico on May 22, 2003, the petitioner was apprehended at the border, put into detention, and placed into removal proceedings based upon his 1996 conviction.

6. On September 10, 2003, the Immigration Judge (hereinafter "IJ") in Los Fresnos, Texas ordered him removed.

7. A timely appeal was filed with the Board on October 10, 2003.

8. On January 8, 2004, the Board dismissed the appeal, finding the petitioner to be: (a) ineligible for relief under former INA § 212(c), 8 U.S.C. § 1182(c) (repealed), (b) ineligible eligible for cancellation of removal under INA § 240A, 8 U.S.C. § 1229b, and (c) an aggravated felon as defined under INA § 101(a)(43)(B), 8 U.S.C. § 1101(a)(43)(B).

9. On January 23, 2004, the petitioner filed a timely petition for review of the Board's decision with the U.S. Court of Appeals for the Fifth Circuit.

10. The Fifth Circuit dismissed the petition for review for lack of jurisdiction on February 16, 2004.

REASONS FOR GRANTING THE PETITION

I. MOOTNESS

Article III of the United States Constitution limits the jurisdiction of federal courts to the consideration of "Cases" and "Controversies." U.S. Const. art III, § 2. A live case or controversy exists in the instant case notwithstanding the fact that petitioner has already been removed. *See United States v. Villamonte-Marquez*, 462 U.S. 579, 581 n.2, 77 L. Ed. 2d 22, 103 S. Ct. 2573 (1983) ("That respondents have been deported likewise does not remove the controversy involved."). In order to satisfy the case-or-controversy requirement, petitioner "'must have suffered, or be threatened with, an actual injury traceable to the [respondent] and likely to be redressed by a favorable judicial decision.'" *See Spencer v. Kemna*, 523 U.S. 1, 7, 140 L. Ed. 2d 43, 118 S. Ct. 978 (1998) (quoting *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477, 108 L. Ed. 2d 400, 110 S. Ct. 1249 (1990)).

The fact that petitioner in the instant case will be barred from reentering the United States for life constitutes sufficient actual and ongoing injury to him. In addition, there exists a sufficient likelihood of being redressed by the § 212(c) relief petitioner seeks. The present petition for writ of certiorari with this Court is therefore not moot.

II. THE COURT OF APPEALS ERRED IN DISMISSING THE PETITIONER'S CASE BELOW FOR LACK OF JURISDICTION.

In accordance with Fifth Circuit case law, the court of appeals has jurisdiction to consider, in an immigration case, whether specific conditions exist to bar jurisdiction over the merits. *Balogun v. Ashcroft*, 270 F.3d 274, 278 (5th Cir. 2001). Accordingly, the Fifth Circuit determines, as a threshold matter, whether the petitioner is (1) an alien, (2) who is deportable, (3) for committing the type of crime that bars review. *Nehme v. INS*, 252 F.3d 415, 420 (5th Cir. 2001) (discussing IIRIRA's "final" rules of judicial review, codified at 8 U.S.C. § 1252.)

At issue was whether the petitioner's September 20, 1996 conviction constituted an aggravated felony within the meaning of INA § 101(a)(43)(B), 8 U.S.C. § 1101(a)(43)(B), thereby, divesting the court of appeals of jurisdiction pursuant to the jurisdiction-stripping effect of INA § 242(a)(2)(C), 8 U.S.C. § 1252(a)(2)(C).

A. THE COURT OF APPEALS BELOW ERRED IN CONCLUDING THAT PETITIONER'S 1996 OFFENSE CONSTITUTED AN AGGRAVATED FELONY UNDER § 101(a)(43) OF THE ACT – THEREBY DIVESTING IT OF JURISDICTION OVER THE PETITION FOR REVIEW – BECAUSE THE PETITIONER'S MICHIGAN CONVICTION WAS IMPROPERLY OBTAINED AND VIOLATED HIS DUE PROCESS RIGHTS AS A RESULT OF INCONSISTENCIES IN THE CHARGING DOCUMENTS.

The government has the burden of establishing, by clear and convincing evidence, an alien's removability as

charged. 8 U.S.C. § 1229a(c)(3). Such evidence must be reasonable, substantial, and probative. *Id.* Moreover, both the nature and amount of the controlled substance constitute essential elements of a delivery offense under MCL § 333.7401. *People v. Mass*, 464 Mich. 615, 625-626, 628 N.W.2d 540, 547 (2001).

The Michigan statute under which the petitioner was convicted was amended on March 30, 1995, creating a new section dealing specifically with marijuana at Michigan Compiled Laws § 333.7401(2)(d). However, the initial, first amended, and second amended complaints on record against the petitioner – each filed subsequent to March 30, 1995 – all charged him with "possess[ion] with intent to deliver the controlled substance Marihuana . . . ," but cited Michigan Compiled Laws § 333.7401(2)**(c)** "Delivery/ Manufacture (**Schedule 4**) [emphasis added]." *See* App., *infra*, 9a-14a. The maximum possible punishment under subsection § 333.7401(2)**(c)** is "4 years and/or $2,000." Following its amendment on March 30, 1995, MCL § 333.7401(2)(c) referred only to "Schedule 4" substances, but marijuana is clearly *not* on that schedule (App., *infra*, 7a-8a). Hence, it is unclear as to whether the petitioner was being charged and convicted for marijuana or something else under Schedule 4.

In addition to being unclear as to the identity of the controlled substance, the charging documents also failed to specify the quantity for which the petitioner was being charged even though quantity is an essential element of a delivery offense under Michigan Compiled Laws § 333.7401. *Mass*, 464 Mich. at 626. The amount of the controlled substance being charged constitutes an element under MCL § 333.7401 because the severity of the crime being charged is statutorily dependent upon the application of

various subsections under Michigan Compiled Laws § 333.7401(2). Similarly, the Fifth Circuit[1] also requires that drug quantities under the federal counterpart, 21 U.S.C. § 841, be considered an element of that offense. *United States v. Brown*, 305 F.3d 304, 308 (5th Cir. 2002) (per curiam), cert. denied, *Brown v. U.S.*, 155 L. Ed. 2d 840, 123 S. Ct. 1919 (2003). Moreover, Fifth Circuit case law defines aggravated felony as a crime that is: (1) punishable under the Controlled Substances Act (hereinafter "CSA") and (2) labeled a felony under either state or federal law. *United States v. Caicedo-Cuero*, 312 F.3d 697, 703 n.32 (5th Cir. 2002), cert. denied, 155 L. Ed. 2d 864, 123 S. Ct. 1948 (2003).

Without having been charged with a specified quantity of drugs then, the petitioner's offense cannot be punishable under the CSA – specifically, 21 U.S.C. § 841. Hence, the conviction failed to meet even the Fifth Circuit's own criteria as to the requirements for aggravated felonies. Accordingly, both the Board and the Fifth Circuit erred insofar as their determination that the petitioner's underlying offense constituted an aggravated felony under the Act.

Since the charging documents as presented by the Service are obviously unclear as to the exact nature and amount of the controlled substance being charged (*e.g.*,

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[1] Although, Michigan, wherein the petitioner was convicted of the underlying offense, is part of the Sixth Circuit Court of Appeals, venue in a petition for review is restricted to the court of appeals for the judicial circuit in which the immigration judge completed the proceedings – the Court of Appeals for the Fifth Circuit in this case. INA § 242(b)(2), 8 U.S.C. § 1252(b)(2); IIRIRA § 309(c)(4)(D).

marijuana versus one enumerated under Schedule 4), the petitioner respectfully submits that his conviction cannot be used against him for immigration purposes because every element of the offense was not charged, thereby, violating his constitutional due process rights. *United States v. Gaudin*, 515 U.S. 506, 522, 523, 132 L. Ed. 2d 444, 458, 115 S. Ct. 2310, 2320 (1995) ("The Constitution gives a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of *every* element of the crime with which he is charged [emphasis added].").

B. THE COURT OF APPEALS BELOW ERRED IN ITS FAILURE TO EXERCISE JURISDICTION OVER PETITIONER'S SUBSTANTIAL CONSTITUTIONAL CLAIMS NOTWITHSTANDING THE JURISDICTION-STRIPPING EFFECT OF INA § 242(a)(2)(C), 8 U.S.C. § 1252(a)(2)(C).

Even assuming *arguendo* that the petitioner's conviction constitutes an aggravated felony, courts of appeals nevertheless retain jurisdiction over substantial constitutional issues. *Calcano-Martinez v. INS*, 533 U.S. 348, 121 S. Ct. 2268, 2270 n.2, 150 L. Ed. 2d 392 (2001) ("courts of appeals retain jurisdiction to review 'substantial constitutional challenges' raised by aliens who come within the strictures of [8 U.S.C.] § 1252(a)(2)(C)").

Accordingly, the Fifth Circuit, along with several of its sister circuits, have so held. *Balogun*, 270 F.3d at 278 ("Courts also retain jurisdiction to consider whether the jurisdiction-stripping provisions of the statute are being constitutionally applied and to consider any substantial constitutional claims . . ."); *Robledo-Gonzales v. Ashcroft*, 342 F.3d 667, 680 (7th Cir. 2003) ("However, the Supreme

Court's decision in *St. Cyr*, reaching the opposite conclusion with respect to IIRIRA's and AEDPA's effect on habeas review has not altered our view that the courts of appeals still play a role in reviewing substantial constitutional questions arising in the immigration context ... the U.S. Supreme Court has not held that the ability of the district courts to entertain an alien's habeas action negates the authority of the courts of appeals to consider substantial constitutional questions when presented through a petition for review."); *Brooks v. Ashcroft*, 283 F.3d 1268, 1273 (11th Cir. 2002) (Held that the court of appeals is not "foreclosed from consideration of Brooks' Petition [for Review] if he has raised substantial constitutional issues."). *Cf. Ramtulla v. Ashcroft*, 301 F.3d 202, 203-04 (4th Cir. 2002) (per curiam); *Cedano-Viera v. Ashcroft*, 324 F.3d 1062, 1070 (9th Cir. 2003).

Consequently, the petitioner respectfully submits that the Fifth Circuit failed to follow its own precedent as well as that established by this Court in *Calcano-Martinez* and, therefore, erred in failing to exercise jurisdiction over his substantial constitutional claims as they pertain to his due process and equal protection rights.

C. THE JURISDICTION-STRIPPING EFFECT OF INA § 242(a)(2)(C), 8 U.S.C. § 1252(a)(2)(C), IS UNCONSTITUTIONAL BECAUSE CONGRESS CANNOT, REGARDLESS OF WHETHER THE PETITIONER IS AN AGGRAVATED FELON, DIVEST THE COURTS OF JURISDICTION TO REVIEW SUBSTANTIAL CONSTITUTIONAL CHALLENGES WHEN THEY INVOLVE AN ALIEN'S FUNDAMENTAL RIGHTS.

In any event, the petitioner respectfully submits that the jurisdictional-stripping provision at INA § 242(a)(2)(C),

8 U.S.C. § 1252(a)(2)(C), is unconstitutional *insofar as its* bar from any judicial review, a final order of removal of an aggravated felon, even where substantial constitutional challenges have been raised. In the case at bar, 8 U.S.C. § 1252(a)(2)(C) is unconstitutional because it deprives the petitioner of his fundamental rights to due process as guaranteed by the Due Process clause of the Fifth Amendment of the U.S. Constitution. U.S. Const., amend. V.

It is axiomatic that even an illegal alien in the U.S. has a right to due process, as the Constitution does not distinguish between citizens and non-citizens in this context. *See Landon v. Plascencia*, 459 U.S. 21, 32 (1982) ("Our cases have frequently suggested that a continuously present resident alien is entitled to a fair hearing when threatened with deportation"); *Vajtauer v. Commissioner of Immigration*, 273 U.S. 103, 106 (1927); *Mahler v. Eby*, 264 U.S. 32, 41 (1924); *Wong Wing v. United States*, 163 U.S. 228, 16 S. Ct. 977, 41 L. Ed. 140 (1896). Judicial review of administrative actions is favored, *INS v. St. Cyr*, 533 U.S. 289, 298 (2001), especially in cases such as the one at bar, where substantial constitutional issues are implicated. Therefore, jurisdiction should have been exercised over the petitioner's case at the U.S. Court of Appeals below.

III. RELIEF UNDER FORMER § 212(c) SHOULD BE EQUALLY AVAILABLE TO LAWFUL PERMANENT RESIDENTS WHO ENTERED INTO PLEA AGREEMENTS AS WELL AS THOSE WHO, LIKE THE PETITIONER, DECIDED TO GO TO TRIAL UPON THE RELIANCE THAT SUCH RELIEF WOULD REMAIN AVAILABLE TO THEM REGARDLESS OF THE VERDICT AT TRIAL.

Nothing in the INA or § 212(c) supports the creation of a distinction between lawful permanent residents (hereinafter

"LPRs") who were convicted after trial and LPRs who were convicted after pleading guilty for purposes of 212(c) eligibility. Such a position simply does not comport with this Court's decisions in *Landgraf* and *St. Cyr infra*.

In *Landgraf*, the Supreme Court set forth a two-step analysis to determine whether a statute can be applied retroactively. First, one must examine the statute to ascertain whether Congress has clearly expressed its intent to apply the law retroactively. *Landgraf v. USI Film Products*, 511 U.S. 244, 280 (1994). If Congress has made its intent clear, the inquiry ends there. *Id.* However, where Congress has not clearly expressed its intent, then the second step of the *Landgraf* analysis requires that one determine whether the statute has a retroactive effect. *Id.*

The Supreme Court has already determined that Congress did not clearly express its intent to apply IIRIRA's repeal of INA § 212(c) retroactively. *St. Cyr*, 533 U.S. at 320. It also held that applying the repeal of § 212(c) to LPRs who entered into *plea agreements* prior to the effective date of IIRIRA does present "an obvious and severe retroactive effect." *Id.* at 325. Therefore, the only open issue on whether the restriction and repeal of INA § 212(c) should be applied retroactively to LPRs who were convicted after *trial* is whether such application similarly results in an impermissible retroactive effect. As the following discussion clearly demonstrates, prohibiting LPRs who were convicted after trial from applying for § 212(c) relief imposes a serious retroactive effect.

A. MANY LAWFUL PERMANENT RESIDENTS WHO, LIKE THE PETITIONER, ELECTED TO GO TO TRIAL DID SO IN RELIANCE OF THE FACT THAT THEY WOULD STILL BE ELIGIBLE TO APPLY FOR § 212(c) RELIEF EVEN IF THEY WERE FOUND GUILTY FOLLOWING A JURY TRIAL.

As the Supreme Court observed in *St. Cyr*, "[t]here is a clear difference, for the purposes of retroactivity analysis, between facing possible deportation and facing certain deportation." *Id.* Like the lawful permanent residents in *St. Cyr*, those convicted following a trial could very well have relied on the availability of 212(c) relief in making certain decisions regarding the disposition of criminal charges.

Prior to April 24, 1996, LPRs were eligible to apply for 212(c) relief so long as they did not actually serve five years in prison for their crimes. INA § 212(c), 8 U.S.C. § 1182(c) (1994) Because § 212(c) and the INA do not distinguish between those convicted pursuant to a plea agreement and those convicted after trial, LPRs who were facing criminal charges only needed to consider the final outcome of their conviction (length of sentence, time actually served) rather than the mode of conviction (by plea or by trial).

Hence, these LPRs, like the petitioner in the instant case, only needed to consider whether they would be required to serve more than five years if they were found guilty after a trial in order to ensure their continuing eligibility to apply for 212(c) relief. For instance, where the LPR determined that he or she would serve less than five years even if found guilty after the trial (*e.g.*, where the maximum sentence possible was less than five years), then

the LPR was free to make the decision to go to trial based on non-immigration considerations, such as the belief in his or her own innocence, financial and emotional factors, the strength of the government's case, etc., etc.

In other words, many LPRs decided to go to trial in reliance upon the fact that they would still be eligible to apply for 212(c) relief even if they were later found guilty after a trial. Had they known that the government would prevent them, years later, from applying for 212(c) relief solely on the ground that they had elected to go to trial, many of these LPRs, including the petitioner, would have taken a plea instead in order to preserve their eligibility to apply for 212(c) relief. Therefore, LPRs who were convicted after trial relied on the availability of 212(c) relief as much as LPRs in *St. Cyr* who were convicted pursuant to plea agreements.

B. PRECLUDING LPRs CONVICTED AFTER TRIAL FROM APPLYING FOR § 212(c) RELIEF WOULD "ATTACH NEW LEGAL CONSEQUENCES" TO DECISIONS MADE PRIOR TO THE REPEAL OF § 212(c) AND "DISTURB SETTLED EXPECTATIONS."

The Supreme Court has also held that a statute has retroactive effect if it "takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past." *Landgraf*, 511 U.S. at 269. In performing the *Landgraf* analysis in *St. Cyr*, the Supreme Court observed that one should make a "commonsense, functional judgment about whether the new provision attaches new legal consequences to events completed before its enactment," and

whether doing so would offend "familiar considerations of fair notice, reasonable reliance, and settled expectations." *St. Cyr*, 533 U.S. at 321. Thus, *St. Cyr* did not inquire into whether the particular defendant in the particular case specifically relied on the availability of 212(c) relief.

The best standard for determining retroactive effect under *Landgraf* and its progeny is the date of conduct. For this purpose, it does not matter that the conduct was illegal or wrongful. The Supreme Court has observed that "[e]ven when the conduct in question is morally reprehensible, a degree of unfairness is inherent whenever the law imposes additional burdens based on conduct that occurred in the past." *Landgraf*, 511 U.S. at 283 n.35. As a result, the test for retroactive effect is whether the new law created new legal consequences for past conduct. In *Landgraf*, the Supreme Court held that compensatory and punitive damages for sexual harassment in Title VII cases could not be applied retroactively because these penalties were not in effect on the date that the harassment occurred. 511 U.S. at 283-84. *See also Rivers v. Roadway Express, Inc.*, 511 U.S. 298 (1994) (unlawful racial discrimination).

As discussed *supra*, prior to AEDPA and IIRIRA, many LPR defendants who decided to go to trial reasonably relied upon the availability of 212(c) relief. Many were advised by their immigration and/or criminal lawyers that their convictions would not result in mandatory deportation. They were further informed that so long as they were able to show rehabilitation and establish a record of law-abiding behavior, it would be highly probable that the waiver would be granted should the government ever decide to initiate deportation proceedings. The elimination of 212(c) relief for these individuals clearly "attaches new

legal consequences to events completed before its enactment." *St. Cyr*, 533 U.S. at 321. The new consequence – *mandatory* deportation – thoroughly disrupts the "settled expectations" of these individuals and their trust in the law's repose. *Id.* at 323.

In any event, reliance is but one means of ascertaining whether a statute has retroactive effect. To this end, the Supreme Court has found impermissible retroactive effect without considering whether a party did rely – or even could have relied – on the prior law. *See, e.g., Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939 (1997) (conducting retroactivity analysis without any discussion of the defendant's reliance on prior law either in engaging in its primary conduct, which was submission of a false claim to the government, or its secondary conduct, which was disclosure of that information to the government).

C. CONGRESS DID NOT INTEND TO DISCRIMINATE BETWEEN THOSE WHO PLED GUILTY VERSUS THOSE WHO WERE CONVICTED AFTER TRIAL FOR PURPOSES OF § 212(c) RELIEF.

Nothing in the INA supports limiting *St. Cyr's* finding of retroactive effect to LPRs who pled guilty. Moreover, retroactivity analysis serves as a proxy for congressional intent. *Landgraf*, 511 U.S. at 272. *See also Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 858 n.3 (1990) (Scalia, J., concurring) (the "application of the presumption [against statutory retroactivity], like the presumption itself, seeks to ascertain the probable legislative intent"); *Landgraf*, 511 U.S. at 273 (Congress passes statutes against the "predictable background rule" of the

presumption against retroactivity). Finally, there is no basis to conclude that Congress sought to distinguish between LPRs convicted pursuant to plea agreements and LPRs convicted at trial. The plain language of the statute is, in fact, to the contrary.

In IIRIRA, Congress legislated with respect to "convictions," as opposed to "trials" or "pleas." The definition adopted by Congress explicitly includes both judgments after trial as well as guilty pleas. *See* INA § 101(a)(48)(A)(i), 8 U.S.C. § 1101(a)(48)(A)(i). *See also* INA § 237(a)(2), 8 U.S.C. § 1227(a)(2) (defining deportable offenses with reference to convictions), INA § 240A(a), 8 U.S.C. § 1229b(a) (cancellation of removal not available to an immigrant "convicted" of an aggravated felony). Such legislative decision in IIRIRA is consistent with congressional decisions in pre-IIRIRA law, where Congress also legislated with respect to "convictions" without making a distinction as to how the conviction was obtained. *See, e.g.*, former INA § 212(c), 8 U.S.C. § 1182(c) (§ 212(c) relief available to all lawful permanent residents except those "convicted" of an aggravated felony and sentenced to more than five years of imprisonment). Had Congress determined it to be desirable to draw a distinction between noncitizens who pled and those who did not, the new law would have reflected this policy choice. *See Landgraf*, 511 U.S. at 273 (clear statement requirement forces Congress to take responsibility "for fundamental policy judgments concerning the proper temporal reach of statutes").

Also relevant are the so-called "Soriano" regulations. Section 1003.44 of the Code of Federal Regulations currently permits certain aliens who were in deportation proceedings before April 24, 1996 to file a motion to reopen in order to seek 212(c) relief that they were denied on the

basis of the Attorney General's 1997 interpretation of AEDPA § 440(d) in *Matter of Soriano*, 21 I. & N. Dec. 516 (BIA 1996). 8 C.F.R. § 1003.44. These regulations equally benefit LPRs who were convicted at trial and LPRs who pled guilty. *See also Small v. Ashcroft*, 209 F. Supp. 2d 294, 296 (S.D.N.Y. 2002) (LPR in deportation proceedings before the enactment of AEDPA and IIRIRA is eligible for § 212(c) relief, even though he was convicted at trial). Hence, a narrow interpretation of *St. Cyr* now would require a dramatic deviation from the government's own regulation by improperly distinguishing between LPRs who were convicted after plea agreements and LPRs who were convicted after trial.

To hold otherwise would mean that an LPR who had pled guilty to a particular deportable offense would now have the right to apply for 212(c) relief, whereas an LPR who was convicted at trial of *the identical charge, and on the same day,* would face *mandatory* deportation. It is inconceivable that Congress intended this result, nor should AEDPA and IIRIRA be interpreted to bring about such an unjust result.

D. DUE PROCESS AND EQUAL PROTECTION VIOLATIONS.

Pursuant to the Fifth and Fourteenth Amendments to the U.S. Constitution, no "person" shall be deprived of life, liberty or property without due process of law. Furthermore, the Fourteenth Amendment commands that no "person" shall be denied the equal protection of the laws. It is well established that all individuals in the United States – citizens and aliens alike – are protected by the Due Process Clause of the Constitution. *See, e.g., Mathews v. Diaz*, 426

U.S. 67, 77, 48 L. Ed. 2d 478, 96 S. Ct. 1883 (1976). It is equally well established that the Due Process Clause incorporates the guarantees of equal protection. *Johnson v. Robison*, 415 U.S. 361, 364 n.4, 39 L. Ed. 2d 389, 94 S. Ct. 1160 (1974). The safeguards of due process and equal protection will generally be afforded to both citizens and aliens against arbitrary federal or state action. *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S. Ct. 1064, 30 L. Ed. 220 (1886); *Wong Wing v. United States*, 163 U.S. 228, 16 S. Ct. 977, 41 L. Ed. 140 (1896); *Truax v. Raich*, 239 U.S. 33, 36 S. Ct. 7, 60 L. Ed. 131 (1915); *Graham v. Richardson*, 403 U.S. 365, 91 S. Ct. 1848, 29 L. Ed. 2d 534 (1971). Finally, federal classifications based on alienage are subject to relaxed scrutiny. *Nyquist v. Mauclet*, 432 U.S. 1, 7 n.8, 53 L. Ed. 2d 63, 97 S. Ct. 2120 (1977). Federal classifications distinguishing among groups of aliens thus are valid unless "wholly irrational." *Mathews*, 426 U.S. at 83.

In the instant case, the petitioner, a lawful permanent resident of the United States, possessed an undeniable constitutional right to a jury trial in his underlying criminal proceedings. Aliens, like the petitioner, who genuinely believe in their innocence against the criminal charges being brought against them in a court of law should not be forced to forego their constitutional right to do so and plead guilty merely to preserve eligibility for 212(c) relief – an entirely discretionary form of relief that is not guaranteed, constitutionally or otherwise, even where full eligibility has been established.

At the time he made a decision to plead not guilty in 1995, 212(c) relief was still available to the petitioner because even if he were to be convicted and sentenced to the maximum term of 4 years, he would still have been eligible for 212(c) relief at the time. Hence, the petitioner was no

less disrupted, and hence no different than someone who had pled guilty, in terms of his expectations for 212(c) relief. There is no rational reason then, to distinguish between those who have pled guilty versus those who elected to exercise their constitutional right to go to trial. Accordingly, a narrow interpretation of *St. Cyr* necessarily violates the petitioner's right to equal protection under the Constitution.

Many LPRs in the petitioner's position were convicted of crimes many years ago, even decades ago. They have reformed and established lives here, married U.S. citizens, raised children, purchased homes, and established businesses believing that, if deportation proceedings were commenced, they had a very real chance for relief. To subject these persons to mandatory deportation solely on the ground that they had exercised their constitutional right to go to trial would attach "new legal consequences" to their actions and "disrupt settled expectations." Such retroactive application of § 440(d) of AEDPA or § 304(b) of IIRIRA is simply unfair and unjust.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

BRIAN D. LERNER
Counsel of Record
LAW OFFICES OF BRIAN D. LERNER
A PROFESSIONAL CORPORATION
519 West Carson Street, Suite 203
Carson, California 90745

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-60053

JESUS GARCIA-ZAVALA

Petitioner

v.

JOHN ASHCROFT, U S ATTORNEY GENERAL

Respondent

Petition for Review of an Order of the
Board of Immigration Appeals

(Filed Feb. 16, 2004)

Before JONES, BENAVIDES, and CLEMENT, Circuit Judges.

BY THE COURT:

IT IS ORDERED that petitioner's motion for stay of deportation pending review is DENIED as moot.

IT IS FURTHER ORDERED that respondent's motion to dismiss the petition for review for lack of jurisdiction is GRANTED.

IT IS FURTHER ORDERED that respondent's alternative motion for an extension of sixty (60) days from this

Court's denial of the motion to dismiss to file the administrative record is DENIED as unnecessary.

APPENDIX B

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A41 414 857 – Los Fresnos Date: JAN 08 2004

In re: JESUS GARCIA-ZAVALA

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Camille O. Bowman, Esquire

ON BEHALF OF DHS: Dona J.F. Justus
Assistant Chief Counsel

CHARGE:

Notice: Sec. 212(a)(2)(A)(i)(II), I&N Act [8 U.S.C. § 1182(a)(2)(A)(i)(II)] – Controlled substance violation

APPLICATION: Waiver; cancellation of removal

The respondent timely appeals an Immigration Judge's September 10, 2003, decision determining that the respondent was not eligible for cancellation of removal under section 240A of the Immigration and Nationality Act, 8 U.S.C. § 1229b, or a waiver under former section 212(c) of the Act, 8 U.S.C. § 1182(c) (repealed). The appeal will be dismissed.

On appeal, the respondent argues that he is eligible for a waiver under former section 212(c), even though he was found guilty by a jury. The respondent also argues

that his conviction for possession of marihuana with intent to deliver was not an aggravated felony within the meaning of section 101(a)(43)(B) of the Act, 8 U.S.C. § 1101(a)(43)(B), and, therefore, that he is eligible for cancellation of removal.

We agree with the Immigration Judge that former section 212(c) does not apply to the respondent because he was convicted by a jury at trial, rather than by guilty plea (I.J. at 3-4). *See INS v. St. Cyr*, 533 U.S. 289 (2001); *Rankine v. Reno*, 319 F.3d 93 (2nd Cir. 2003); *Dias v. INS*, 311 F.3d 456 (1st Cir. 2002); *Perez v. Elwood*, 294 F.3d 552 (3rd Cir. 2002); *Chambers v. Reno*, 307 F.3d 284 (4th Cir. 2002); *Armendariz-Montoya v. Sonchik*, 291 F.3d 1116 (9th Cir. 2002); *Brooks v. Ashcroft*, 283 F.3d 1268 (11th Cir. 2002). To the extent that the respondent raises constitutional challenges regarding his eligibility for a waiver, we do not have jurisdiction. *See Matter of C-*, 20 I&N Dec. 529, 532 (BIA 1992).

We also agree with the Immigration Judge that the respondent's conviction was an aggravated felony under the Act (I.J. at 4). An aggravated felony is defined in section 101(a)(43)(B) as illicit trafficking in a controlled substance (as defined in section 102 of the Controlled Substances Act), including a drug trafficking crime (as defined in 18 U.S.C. § 924(c)). In the Fifth Circuit, a state drug conviction is a drug trafficking crime, and thus an aggravated felony, if (1) the offense was punishable under the Controlled Substances Act; and (2) it was a felony under either state or federal law. *United States v. Hernandez-Avalos*, 251 F.3d 505, 508 (5th Cir. 2001). We are bound by the Fifth Circuit's precedent. *See Matter of Yanez*, 23 I&N Dec. 390 (BIA 2002).

The respondent was convicted by a jury under M.C.L. § 333.7401(2)(c) (1994) (Exh. 2 at 7), which provided, in relevant part:[1]

> Sec. 7401. (1) Except as authorized by this article, a person shall not manufacture, create, deliver, or possess with intent to manufacture, create, or deliver a controlled substance, a prescription form, an official prescription form, or a counterfeit prescription form. A practitioner licensed by the administrator under this article shall not dispense, prescribe, or administer a controlled substance for other than legitimate and professionally recognized therapeutic or scientific purposes or outside the scope of practice of the practitioner, licensee, or applicant.
>
> (2) A person who violates this section as to:
>
> (c) A substance classified in schedule 4 or marihuana, is guilty of a felony, punishable by imprisonment for not more than 4 years, or a fine of not more than $2,000.00, or both.

It is clear that the respondent's conviction was a felony under state law.

To the extent the Michigan statute is divisible, as the respondent contends, we observe that the Immigration Judge correctly examined the conviction record, and correctly held that the respondent's conviction was an

---

[1] Effective June 1, 1994, the Michigan legislature amended section 7401(1) to include "create." Effective March 30, 1995, after the date of the respondent's offense, the Michigan legislature amended section 7401(2)(c) to delete "or marihuana" from subsection (2)(c) and inserted a new subsection (2)(d) dealing specifically with marihuana.

aggravated felony (I.J. at 4). According to the certified conviction record, which was admitted without objection (Tr. at 8-9), the respondent was found guilty under count I of the delivery and manufacture of a controlled substance, and count I stated that the respondent possessed with the intent to deliver the controlled substance marihuana (Exh. 2 at 3-7). Possession with intent to deliver is a specific intent crime. *People v. Mass*, 628 N.W. 2d 540, 551 n. 21 (Mich. 2001). Marihuana is a controlled substance under 21 U.S.C. § 812(c), sch. 1(c)(10). *See Matter of Elgendi*, 23 I&N Dec. 515, 520 (BIA 2002). The possession of marihuana with the intent to deliver is punishable under the Controlled Substance Act. 21 U.S.C. § 841(a)(1) (" . . . it shall be unlawful for any person knowingly or intentionally to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; . . . .") Since the respondent's state drug conviction was an aggravated felony, the respondent is not eligible for cancellation of removal.

ORDER: The appeal is dismissed.

/s/ _____
FOR THE BOARD

APPENDIX C

MCL § 333.7218

§ 333.7218. **Schedule 4;** controlled substances included.

Sec. 7218. (1) The following controlled substances are included in **schedule 4:**

(a) Any material, compound, mixture, or preparation containing any quantity of the following substances having a potential for abuse associated with a depressant effect on the central nervous system, including their salts, isomers, and salts of isomers if the existence of the salts, isomers, and salts of isomers is possible within the specific chemical designation:

Barbital
Chloral Betaine
Chloral Hydrate
Chlordiazepoxide
Clonazepam
Clorazepate
Dextropropoxyphene
Diazepam
Ethchlorvynol
Ethinamate
Flunitrazepam
Flurazepam
Lorazepam
Mebutamate
Meprobamate
Methohexital
Methylphenobarbital
Oxazepam
Paraldehyde
Petrichloral
Phenobarbital
Prazepam

(b) Any material, compound, mixture, or preparation containing any quantity of the following substances having a potential for abuse associated with an effect on the central nervous system, including their salts, optical, positional, or geometric isomers, and salts of the isomers if the existence of the salts, isomers, and salts of isomers is possible.

Fenfluramine

(c) Any material, compound, mixture, or preparation containing any quantity of the following substances having a potential for abuse associated with a stimulant effect on the central nervous system, including their salts, optical, positional, or geometric isomers, and salts of the isomers if the existence of the salts, isomers, and salts of isomers is possible within the specific chemical designation.

Diethylpropion

Phentermine

Pemoline, including organometallic complexes and chelates of pemoline.

(2) The administrator may except by rule any compound, mixture or preparation containing any substance listed in subsection (1) from the application of all or any part of this article if the compound, mixture or preparation contains 1 or more active medicinal ingredients not having a depressant or stimulant effect on the central nervous system and if the admixtures are in combinations, quantity, proportion, or concentration that vitiate the potential for abuse of the substances having a depressant or stimulant effect on the central nervous system.

APPENDIX D

STATE OF MICHIGAN

IN THE CIRCUIT COURT
FOR THE COUNTY OF OAKLAND

THE PEOPLE OF THE STATE OF MICHIGAN, Plaintiff, vs. Jesus Garcia Zavala a/k/a Jessie 63-94-055534-01 Mario Enrique Juarez 63-94-055534-02 Defendants,	Case No. CR 95-140557-FH CR 95-140558-FH Page 01 of 01 General Information Witness Lists (Filed Aug. 25, 1995)

GENERAL INFORMATION

IN THE NAME AND BY AUTHORITY OF THE PEOPLE OF THE STATE OF MICHIGAN:

RICHARD THOMPSON, Prosecuting Attorney for the County of Oakland, who prosecutes for and on behalf of the People of the State of Michigan, appears before the Court and informs the Court that in Oakland County, Michigan, Defendant(s), on or about July 19, 1994

COUNT I: CONTROLLED SUBSTANCE – DELIVERY/ MANUFACTURE (SCHEDULE 4) (As to both defendants)

did possess with intent to deliver the controlled substance Marihuana; Contrary to the statute in such case made and provided and against the peace and dignity of the People of the State of Michigan.

MCL 333.7401(2)(c); M.S.A. 14.15(7401)(2)(c). (333.74012C-A).

FELONY: 4 Years and/or $2,000.00

COUNT II: POSSESSION OF A FIREARM IN THE COMMISSION OF A FELONY (As to Mario Enrique Juarez only)

did carry or have in his possession a firearm, to-wit: pistol, at the time he committed or attempted to commit a felony, to-wit: possession of marijuana with intent to deliver; Contrary to the statute in such case made and provided and against the peace and dignity of the People of the State of Michigan.

Sec. 750.227b, C.L. 1979; M.S.A. 28.424(2). (750.227B-A).

FELONY: 2 Years consecutively with and preceding any term of imprisonment imposed for the felony or attempted felony conviction.

RICHARD THOMPSON
PROSECUTING ATTORNEY

By: /s/ _____
Assistant Prosecuting Attorney

STATE OF MICHIGAN

IN THE CIRCUIT COURT
FOR THE COUNTY OF OAKLAND

THE PEOPLE OF THE STATE OF MICHIGAN, Plaintiff, vs. Jesus Garcia Zavala a/k/a Jessie 63-94-055534-01 Mario Enrique Juarez 63-94-055534-02 Defendants,	FIRST AMENDED Case No. CR 95-140557-FH CR 95-140558-FH Page 01 of 02 General Information Witness Lists (Filed Dec. 15, 1995)

GENERAL INFORMATION

IN THE NAME AND BY AUTHORITY OF THE PEOPLE OF THE STATE OF MICHIGAN:

RICHARD THOMPSON, Prosecuting Attorney for the County of Oakland, who prosecutes for and on behalf of the People of the State of Michigan, appears before the Court and informs the Court that in Oakland County, Michigan, Defendant(s), on or about July 19, 1994

COUNT I: CONTROLLED SUBSTANCE – DELIVERY/ MANUFACTURE (SCHEDULE 4) (As to both defendants)

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Sec. 750.227b, C.I. 1979; M.S.A. 28.424(2). (750.227B-A).

FELONY: 2 Years consecutively with and preceding any term of imprisonment imposed for the felony or attempted felony conviction.

RICHARD THOMPSON
PROSECUTING ATTORNEY

By: /s/ _____
Assistant Prosecuting Attorney

STATE OF MICHIGAN

IN THE CIRCUIT COURT
FOR THE COUNTY OF OAKLAND

THE PEOPLE OF THE STATE OF MICHIGAN, Plaintiff, vs. Jesus Garcia Zavala a/k/a Jessie 63-94-055534-01 Mario Enrique Juarez 63-94-055534-02 Defendants,	SECOND AMENDED Case No. CR 95-140557-FH CR 95-140558-FH Page 01 of 01 General Information Witness Lists (Filed Aug. 9, 1996)

GENERAL INFORMATION

IN THE NAME AND BY AUTHORITY OF THE PEOPLE OF THE STATE OF MICHIGAN:

RICHARD THOMPSON, Prosecuting Attorney for the County of Oakland, who prosecutes for and on behalf of the People of the State of Michigan, appears before the Court and informs the Court that in Oakland County, Michigan, Defendant(s), on or about July 19, 1994

COUNT I: CONTROLLED SUBSTANCE – DELIVERY/ MANUFACTURE (SCHEDULE 4) (As to both defendants)

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Sec. 750.227b, C.L. 1979; M.S.A. 28.424(2). (750.227B-A).

FELONY: 2 Years consecutively with and preceding any term of imprisonment imposed for the felony or attempted felony conviction.

RICHARD THOMPSON
PROSECUTING ATTORNEY

By: /s/ _____
Assistant Prosecuting Attorney